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No. 87-5677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WARREN LEE HARRIS,

Petitioner,

vs.

MARVIN REED, Warden, and NEIL F. HARTIGAN, Attorney General of the State of Illinois,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. When a state court opinion is unclear whether it rests on adequate and independent state grounds or the merits of a federal constitutional claim, should that ambiguity be resolved in favor of affording habeas review of the constitutional claim?

2. Whether the appellate court's opinion, although lacking an explicit statement of the holding, found that petitioner waived all claims but the alibi-related claim when he failed to present them on direct appeal?

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

State Court Proceedings

The petitioner, Warren Lee Harris, was convicted of murder on February 2, 1978, in the Circuit Court of Cook County and sentenced to serve 50-100 years. (J. App. 1)

On direct appeal the petitioner was represented by the State Appellate Defender and raised one issue: whether he was proved guilty beyond a reasonable doubt. The Illinois Appellate Court, First District, rejected petitioner's contention in an opinion unpublished pursuant to Illinois Supreme Court Rule 23. *People v. Harris*, 71 Ill. App. 3d 1113 (1979). (J. App. 5)

Petitioner filed a *pro se* petition for post-conviction relief. (J. App. 10) Private counsel was appointed to represent him and an amended petition was prepared and filed. (J. App. 10) The amended petition alleged that petitioner was denied his right to effective assistance of counsel in that his trial counsel failed to prepare for trial because he did not interview or call certain witnesses, failed to seek the identity of the informant, failed to call a certain rebuttal witness, failed to enter an offer of stipulation that would perfect an impeachment, failed to investigate an alibi defense, and failed to tell petitioner there would be no alibi defense and ignored petitioner's objection to this decision. (J. App. 10-11) The petition was dismissed without evidentiary hearing. (J. App. 11)

The petitioner appealed from this denial. He claimed that an evidentiary hearing should have been held or that the State should have been required to file an answer rather than a motion to dismiss. (J. App. 11) The Appellate Court, First District, affirmed the circuit court's decision to dismiss the petition in a Rule 23 Order which discussed both procedural default and the merits of some of petitioner's claims. (J. App. 9)

Federal Habeas Corpus Proceeding

The petitioner filed a petition for writ of habeas corpus challenging his conviction and then filed an amended

petition in March of 1980. (J. App. 23) The respondents moved for summary judgment on the ground that the petitioner had a viable state court action pending by way of post-conviction and the petitioner had not exhausted his state remedies. (J. App. 23)

On June 11, 1981, Magistrate Sussman recommended to Judge Flaum that he grant respondents' motion. However, on December 29, 1981, Judge Flaum rejected the recommendation on the ground that the post-conviction action in the Illinois court had been resolved against the petitioner. On January 6, 1982, Magistrate Sussman recommended that the parties brief a single issue: whether newly-discovered evidence existed which exonerated the petitioner. The magistrate suggested that the claim that the post-conviction remedy had been unreasonably delayed was now moot and the ineffective assistance of counsel claim was raised at the post-conviction hearing but not in the federal habeas corpus action.

On May 17, 1982, the respondents asked the court to stay the order or reconsider the order and dismiss the case on the ground that the petitioner had an appeal from the post-conviction denial pending in the state court. The Magistrate accordingly recommended that the cause be dismissed for exhaustion pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982). Judge Flaum adopted this recommendation on October 4, 1982, and dismissed the petition. (J. App. 23)

On April 4, 1983, Judge Flaum granted petitioner's motion to reinstate the action since the appeal of the petition for post-conviction relief had been resolved against the petitioner. (J. App. 23) He permitted the petitioner to file an amended petition. The petitioner filed his amended brief on April 11, 1983. It raised four claims: 1) the hear-

ing on his post-conviction petition was unreasonably delayed; 2) defense counsel rendered ineffective assistance at trial; 3) new evidence exonerates him; and 4) he was not proved guilty beyond a reasonable doubt. (J. App. 20-23)

The cause was reassigned to Judge Getzendanner on August 25, 1983. On October 20, 1983, respondents filed an answer and motion for summary judgment with supporting memorandum. Procedural default was raised in response to the ineffective assistance claims. The petitioner filed a motion in opposition, or alternatively, a cross-motion for summary judgment on November 21, 1983.

On April 8, 1985, Judge Getzendanner granted respondents' motion for summary judgment as to all claims except the ineffective assistance of counsel claim. (J. App. 45) As to this allegation, the judge rejected that the claim was waived and ordered an evidentiary hearing. (J. App. 44) This opinion is reported at 608 F. Supp. 1369. (J. App. 15) The evidentiary hearing took place on three afternoons over November 4, November 14, and November 26, 1986. In lieu of closing argument on the evidence, the parties submitted post-evidentiary hearing memoranda of law by February 26, 1986. (J. App. 45) On May 30, 1986 the judge entered summary judgment for respondents and denied the petition. (J. App. 67)

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed Judge Getzendanner's decision. (J. App. 68)

SUMMARY OF ARGUMENT

I. When a state court opinion is unclear whether it rests on adequate and independent state grounds or the merits of a federal constitutional claim, that ambiguity should be resolved in favor of the state ground so that habeas review is unavailable absent a showing of cause and prejudice. On habeas review, there should be a uniform presumption that the state courts have followed state procedural rules.

This Court has recognized the importance of honoring state procedural rules and that federal intrusion in procedural default cases undercuts the State's ability to enforce its procedural rules.

Procedural default rules are rigidly enforced by Illinois' courts. For example, Illinois' rule that, failure to raise an issue on appeal waives it for purpose of post-conviction review, is relaxed only where required by fundamental fairness. Similarly, the rule of default for failure to timely object to a jury instruction is relaxed only to correct grave errors or where the case is so close factually that fundamental fairness requires the instruction. Illinois Supreme Court Rules allow a limited exception to the general waiver rule, providing that plain errors affecting substantial rights may be noticed although they were not brought to the attention of the trial court. Often, when a claim of error is not properly preserved for review, a state appellate court rejects the claim under "plain error" analysis. In doing so, the court may discuss the merits of the claim to determine whether the alleged error affected substantial rights. If the issue is decided against

the defendant, the appellate court is obviously holding that there is no plain error and the waiver rule should not be relaxed.

Rigid enforcement of waiver and default rules by Illinois courts serve important interests. Failure to make objection strips the trial court of the ability to correct the alleged error. Failure to raise issues in post-trial motions denies the trial court the ability to assess its own alleged errors. Failure to limit the review process by requiring the earliest possible identification of errors allows for open-ended appellate and collateral review.

It will do mischief to Illinois' rules of waiver to accept petitioner's invitation to declare that federal habeas courts should approach default cases with the presumption that state procedural rules must be ignored unless the state court included a mechanical recitation that state law has been followed. Judges are presumed to properly perform their duties and adherence to procedural rules is among the most important of those duties.

Comity requires federal courts to begin with the presumption that the state court has followed its law—not ignored it—unless it explicitly states otherwise. At the very least, the question should be left open to individual interpretation.

Unlike the issue in *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), this is not a case where the merits turn on application of either state or federal law and where it is unclear which law has been applied. In this case, waiver has been discussed and no exceptions to the waiver rules are apparent. Under these circumstances, this Court should assume that the appellate court followed Illinois law.

Respondents' position has been adopted by the Second, Sixth and Eleventh Circuit Courts of Appeals. No fundamental miscarriage of justice can result from this rule since the cause-and-prejudice standard protects against any instance of unjust incarceration.

II. The appellate court's opinion on post-conviction review found that petitioner waived all claims but the alibi-related claim when he failed to present them on direct appeal. The opinion does not mechanically state that "we therefore find the issue waived," but no fair review of the court's discussion, can lead to any other conclusion.

In the opinion, the court stated it was aware of the People's argument that defendant waived his right to assert the claim by his failure to raise it on direct appeal. It stated the general rule that an available claim not raised on direct appeal is waived for purposes of post-conviction review. It stated that this rule does not apply where the claim is based on acts beyond record on appeal. And it found that the claims on post-conviction, with the exception of the alibi claims, were matters which could have been raised on direct appeal.

A habeas court should not interfere with this determination of default under state procedural rules.

ARGUMENT

I.

WHEN A STATE COURT OPINION IS UNCLEAR WHETHER IT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS OR THE MERITS OF A FEDERAL CONSTITUTIONAL CLAIM, THAT AMBIGUITY SHOULD BE RESOLVED IN FAVOR OF THE STATE GROUND SO THAT HABEAS REVIEW IS UNAVAILABLE ABSENT A SHOWING OF CAUSE AND PREJUDICE.

Petitioner urges this Court to adopt a uniform principle consistent with the rule of *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). Under this approach petitioner proposes that federal courts conducting habeas corpus review of state court decisions should presume that the state courts below did not rely on waiver or procedural default in reaching their disposition unless the state court's opinion plainly states that default was found and relied upon.

The respondents agree with the general proposition that a uniform principle may be preferable to an *ad hoc* approach to default questions. The respondents sharply disagree, however, with the suggestion that there should be a uniform presumption that the state courts have not followed state procedural rules.

This Court has recognized the importance of honoring state procedural rules. For instance, in *Wainwright v. Sykes*, 433 U.S. 72, 88-89, 97 S.Ct. 2497, 2507-2508, 53 L.Ed.2d 594, 609 (1977), this Court explained that:

> A contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation. Without the evidence claimed to be vulnerable on federal constitutional grounds, the jury may acquit the defendant, and that will be the end of the case; or it may nonetheless convict the defendant, and he will have one less federal constitutional claim to assert in his federal habeas petition. If the state trial judge admits the evidence in question after a full hearing, the federal habeas court pursuant to the 1966 amendment to § 2254 will gain significant guidance from the state ruling in this regard. Subtler considerations as well militate in favor of honoring a state contemporaneous-objection rule. An objection on the spot may force the prosecution to take a hard look at its hole card, and even if the prosecutor thinks that the state trial judge will admit the evidence he must contemplate the possibility of reversal by the state appellate courts or the ultimate issuance of a federal writ of habeas corpus based on the impropriety of the state court's rejection of the federal constitutional claim.

This Court has recognized similar considerations where the issue involved default by failure to raise a claim on appeal in *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Of particular significance to this case is this Court's expression of concern in *Engle v. Isaac* that federal intrusion in procedural default cases undercuts the State's ability to enforce its procedural rules. *Engle v. Isaac*, 456 U.S. 107, 129, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783, 801 (1982).

Procedural default rules are rigidly enforced by Illinois' courts. For example, in Illinois, the failure to raise an available issue on direct appeal waives the issue for the purpose of review pursuant to the Illinois Post-Conviction Hearing Act. (Ill. Rev. Stat. ch. 38, ¶ 122-1 *et seq.*) *People v. Brown*, 52 Ill. 2d 227, 287 N.E.2d 663 (1972); *See also People v. Edmonds*, 79 Ill. App. 3d 33, 34, 398 N.E. 2d 230, 233 (1st Dist. 1979). The Illinois Supreme Court

has recently reemphasized this rule in *People v. Gaines*, 105 Ill. 2d 79, 87-88, 473 N.E.2d 868, 873 (1984), *cert. denied, sub nom. Gaines v. Illinois*, 471 U.S. 1131, 105 S.Ct. 2666, 86 L.Ed.2d 282 (1985) ("where an appeal was taken from a conviction, the judgment of the reviewing court is *res judicata* as to all issues actually raised, and those that could have been presented but were not are deemed waived.")

The appeal/post-conviction waiver rule will only be relaxed where required by fundamental fairness. *People v. Weaver*, 45 Ill. 2d 136, 138, 256 N.E.2d 816, 817 (1970). The Illinois Supreme Court has recently refused to relax this rule and its limited exception even in capital cases. *People v. Jones*, 109 Ill. 2d 19, 485 N.E.2d 363 (1985), *cert. denied, sub nom. Jones v. Illinois*, 475 U.S. 1090, 106 S.Ct. 1481, 89 L.Ed.2d 735 (1986).

In *People v. Roberts*, 75 Ill. 2d 1, 10-16, 387 N.E.2d 331, 335-337 (1979), the Illinois Supreme Court emphasized that its procedural rules are relaxed only rarely. The court considered the waiver of objection to jury instructions. In its analysis, the court discussed Illinois Supreme Court Rule 451(c) (58 Ill. 2d R. 451(c)), which concerns jury instructions and provides, in part, that "substantial defects are not waived by failure to make timely objections thereto if the interests of justice require." The court concluded that the provisions of Rule 451(c) constitute:

> a limited exception (*People v. Underwood* (1978), 72 Ill. 2d 124, 129-30), to be used to correct grave errors (*People v. Jenkins* (1977), 69 Ill. 2d 61, 66), or to be applied where the case is close factually and fundamental fairness requires that the jury be properly instructed (*People v. Joyner* (1972), 50 Ill. 2d 302, 307).

People v. Roberts, supra, 75 Ill. 2d at 14, 387 N.E.2d at 337.

Illinois Supreme Court Rules also provide only a very limited exception to the general waiver rule. Rule 615(a) provides: "Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." (58 Ill. 2d R. 615(a).) Like Rule 451(c), the "plain error" rule is narrow. *People v. Pastorino*, 91 Ill. 2d 178, 188, 435 N.E.2d 1144, 1149 (1982).

Often, when dealing with a claim of error not properly preserved for review, a state appellate court will reject the claim by means of the "plain error" analysis. In doing so, the court will frequently discuss the merits of the claim in order to determine whether an error affecting substantial rights has been committed. If the issue is decided against the defendant, the appellate court, in effect, is holding that there is no plain error and, therefore, the waiver rule should not be relaxed.

The rigid enforcement of waiver and default rules by Illinois courts, and the very narrow exceptions allowed thereto, serve many important interests of the justice system, the judiciary, and the People of the State of Illinois. Failure to make timely objection, for example, strips the trial court of the ability to cure or correct the alleged error. *See People v. Roberts, supra*, 75 Ill. 2d at 11, 387 N.E.2d at 336. Failure to raise issues in post-trial motions denies the trial court of the ability to assess its own alleged errors and places needless burden on counsel and the courts in preparing and processing appeals. *People v. Caballero*, 102 Ill. 2d 23, 31, 464 N.E.2d 223, 227 (1984), *cert. denied, sub nom. Caballero v. Illinois*, 469 U.S. 963, 105 S.Ct. 362, 83 L.Ed.2d 298 (1984). Similarly, the failure to limit the review process by requiring the earliest possible identification of errors considered to be significant allows for the prospect of open-ended appellate and col-

lateral review. *Cf. People v. Caballero, supra*, 102 Ill. 2d at 31, 464 N.E.2d at 227. ("Without a post-trial motion limiting the consideration to errors considered significant, the appeal is open-ended.")

It will do illogical mischief to Illinois' rules of waiver and default to accept petitioner's invitation to declare that federal courts, on habeas corpus review, should approach default cases with the presumption that the courts of Illinois ignored basic and rigid procedural rules unless the Illinois courts have included in their opinion some mechanical recitation affirming that Illinois law has been followed. It is well-settled that judges are presumed to properly perform their duties. *Bute v. Illinois*, 333 U.S. 640, 671, 68 S.Ct. 763, 779, 92 L.Ed. 986 (1948); *See also Winegar v. Corrections Dept.*, 400 F. Supp. 392, 397 (W.D. Mich. 1975), *aff'd*, 549 F.2d 803 (6th Cir. 1976), *cert. denied*, 430 U.S. 972, 97 S.Ct. 1660, 52 L.Ed.2d 366 (1977). Certainly, the adherence to procedural rules is among the most important of those duties.

Federal courts should begin their analysis of state court application of state law with the presumption that the state court has followed its law—not that it has ignored it. If there is to be a presumption which controls in procedural default cases, the respondents respectfully urge that comity demands that a federal habeas court presume that the state court has followed its law unless it explicitly states otherwise. At the very least, the question should be left open to individual interpretation as opposed to a presumption that the state court has ignored its law.

Unlike the issue in *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), state procedural default does not leave open any confusion over whether the state court has relied on state or federal law. In *Long*,

this Court explicitly based its opinion on a situation where the:

> state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, *and* when the adequacy or independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. (emphasis added)

Michigan v. Long, supra, 463 U.S. at 1040, 103 S.Ct. at 3476, 77 L.Ed.2d at 1214.

The search in question in *Long* presented search and seizure issues under both the Michigan and the United States Constitutions. In that case, it would have been possible to invalidate the search regardless of the federal constitutional claims based on a merits analysis of the same facts under Michigan law. In this case, there is no implication to *any* federal law or constitutional provision resulting from the state procedural rulings. There is no reference to any federal precedent in the appellate court's discussion of the waiver question. Moreover, there is no possibility in view of *Wainwright v. Sykes, supra*, and its progeny, that procedural default is not an adequate independent state ground.

This is not a case, like *Long*, where the merits may turn on application of either state or federal law and where it is unclear which law has been applied. This is a case where waiver has been found pursuant to state rules and where no exceptions to the waiver rules are apparent. Under these circumstances, this Court should assume that the appellate court has followed Illinois law unless the state court explicitly declares otherwise. *See e.g., People v. Ross*, 63 Ill. App. 3d 884, 380 N.E.2d 897 (1st Dist.

1978) (where the court noted the waiver problem and explicitly went on to consider the merits).

The position respondents advocate here is that adopted by the Second, Sixth and Eleventh Circuit Courts of Appeals. *See Martinez v. Harris*, 675 F.2d 51, 54 (2nd Cir. 1982), *cert. denied*, 459 U.S. 849, 103 S.Ct. 109, 74 L.Ed.2d 97 (1982); *Raper v. Mintzes*, 706 F.2d 161, 164 (6th Cir. 1983); *Campbell v. Wainwright*, 738 F.2d 1573, 1578 (11th Cir. 1984), *cert. denied*, 475 U.S. 1126, 106 S.Ct. 1652, 90 L.Ed.2d 195 (1986). Under these decisions, if a prosecutor argues the merits and also argues default in the alternative, the federal habeas court should hold the petitioner to demonstrating "that the state has created in his case an exception to the established rule and reached the merits." *Campbell v. Wainwright*, 738 F.2d at 1578.

No fundamental miscarriage of justice can result from this rule since the cause-and-prejudice standard protects against any instance of unjust incarceration. *Engle v. Isaac*, 456 U.S. at 129, 135; *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 2668, 91 L.Ed.2d 434 (1986). There is nothing fundamentally unfair about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination. *Smith v. Murray*, 106 S.Ct. at 2668.

II.

THE APPELLATE COURT'S OPINION, ALTHOUGH LACKING AN EXPLICIT STATEMENT OF THE HOLDING, FINDS THAT PETITIONER WAIVED ALL CLAIMS BUT THE ALIBI-RELATED CLAIM WHEN HE FAILED TO PRESENT THEM ON DIRECT APPEAL.

While there does seem to be an ambiguity on the face of the opinion on the question of to what extent the ap-

pellate court relied on the procedural default, there is no question that the appellate court found that there was a procedural default. It is true that the Illinois Appellate Court's opinion does not mechanically state that "[w]e therefore find the issue waived." No fair review of the court's discussion, however, can lead to any conclusion other than that the court clearly found the claim to be waived.

In addressing this issue, the court explained that

> The State initially responds that defendant has waived his right to assert a claim of the incompetence of his trial counsel because he failed to raise this issue in his direct appeal.
>
> It is well settled that where a direct appeal is taken from a conviction, the judgment of the reviewing court is *res judicata* as to all issues actually raised, and those which could have been presented, but were not, are considered waived. (*People v. French* (1970), 46 Ill. 2d 104, 262 N.E.2d 901.) Where, however, the allegations in a post-conviction petition are based on facts which do not appear in the record, they are not barred by the doctrine of *res judicata*. *People v. Edmonds* (1979), 79 Ill. App. 3d 33, 398 N.E.2d 230.
>
> In the instant case, defendant alleges incompetence because his trial counsel failed to investigate or call several witnesses on his behalf, to perfect impeachment of the State's chief witness, or to investigate and present an alibi defense. Our examination of the record in this appeal indicates that, except for the alibi witnesses, the identity of the persons set forth by the defendant and their statements to the police were of record, and it also appears that the stipulation alluded to by defendants was contained in the trial record. As such, these matters could have been raised in defendant's direct appeal. (See *People v. Churchill* (1981), 92 Ill. App. 3d 1006, 416 N.E.2d 395.) In this regard we find it noteworthy that defen-

> dant's appellate counsel was not affiliated in any way with his trial counsel, and there is also no indication that defendant expressed any dissatisfaction with his trial counsel at the time the appeal was filed or raised any question regarding the competency of his trial counsel. See *People v. Stewart* (1978), 66 Ill. App. 3d 342, 383 N.E.2d 1179.

(J. App. 12)

Thus, the court

> 1. recognized that the People were arguing that the claim was waived because it had not been presented on direct appeal;
>
> 2. stated that the general rule was that an available claim that is not raised on direct appeal is waived for purposes of post-conviction review;
>
> 3. recognized that this rule does not apply where the claim is based on facts beyond the record on appeal, and;
>
> 4. found that defendant's claims on post-conviction, with the exception of the alibi claims, were all matters which could have been raised on direct appeal.

The respondents respectfully suggest that although lacking a mechanical statement of the holding, the appellate court's opinion finds waiver of all claims not based on the alibi defense. The respondents respectfully suggest that this Court should not interfere with this state court determination of default under state procedural rules.

CONCLUSION

WHEREFORE, the respondents ask this Court to affirm the judgment of the United States Court of Appeals for the Seventh Circuit and uphold the denial of the petition for writ of habeas corpus.

Respectfully submitted,

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